No. 6792.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALEXANDER STUMPF, J. L. COATES, OLIE OLSON, THEODORE BRIX, ZONE KIRKORIAN, D. ARKALIAN, JAMES PROCTOR AND EUGENE L. KENNEY,
Defendants.

J. L. COATES,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

OPENING BRIEF OF J. L. COATES, APPELLANT.

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THE INDICTMENT.

Appellant and seven others were charged in an indictment filed April 22, 1931, containing four counts, as follows:

First Count: Conspiracy to violate the Prohibition Act, Sections 3 and 25 of Title Two thereof, to manu-

facture and possess apparatus designed for the manufacture of intoxicating liquors fit for beverage purposes and to contain more than one-half of one per cent of alcohol by volume, between September 1, 1930, and April 21, 1931.

Second Count: Defendants were charged with having in their possession and control one still and distilling apparatus set up at the Foss Ranch, forty-five miles from Fresno, none of the defendants having or intending to have a permit for that purpose from any authorized official.

Third Count: Defendants were charged with carrying on the business of distillers on said Foss Ranch without giving bond and with intent to defraud the United States of taxes.

Fourth Count: Defendants were charged with having on February 1, 1931, near Fresno, the possession of property and apparatus designed and intended by them for the manufacture of intoxicating liquor for beverage purposes, containing alcohol in excess of one-half of one per cent by volume, in violation of Section 25 of Title Two of the Prohibition Act.

There are ten overt acts set out in count one, none of which alleges an act done in violation of Section 3 of the National Prohibition Act. The charging clause of the conspiracy count alleges that the defendants unlawfully conspired to manufacture and possess apparatus intended and designed for the manufacture of intoxicating liquor, which would be in violation of Section 25 of the Prohibition Act, and would not be covered in Section 3 of that act; but said charging part does not allege that the defendants had or possessed *any liquor*

designed for the manufacture of liquor intended for use in violation of Section 3 of Title Two of the Prohibition Act. This failure to so allege becomes important to a consideration of the error of the court in admitting certain evidence, to be hereinafter referred to.

ASSIGNMENT OF ERRORS.

I.

Count No. 1 of the indictment does not state facts sufficient to charge an offense under the laws of the United States.

II.

The evidence is insufficient to support the verdict.

III.

The verdict is contrary to law and is without necessary evidentiary support.

IV.

The trial Court erred in denying the motion of appellant for a directed verdict at the conclusion of all the evidence. (Tr., p. 186.)

V.

The Court erred in receiving in evidence Government's Exhibit No. 6 (Tr., p. 113). The said exhibit being a large glass container filled with a liquid which the Government's witness, W. G. Whitfield, testified he secured from the gravity tanks on the Foss Ranch April 8, 1931.

VI.

The Court erred in denying the motion of the appellant to strike out the testimony of the Government's witness, Fred Stribling, who testified that he tested the contents of Government Exhibit No. 6 and found it to be mash containing 3.24 per cent alcohol by volume.

VII.

The Court erred in admitting in evidence Government Exhibits Nos. 1, 2 and 3, the same being parts of an alleged still.

VIII.

The Court erred in denying the motion of this appellant to exclude the Government's witness, George Hugo Malter, from the witness stand on the ground that he had read portions of the transcript of testimony by other witnesses furnished him by the Government prior to his taking the witness stand; all witnesses having theretofore been excluded from the courtroom by order of the Court.

IX.

The Court erred in permitting the Government to introduce in evidence the statement of Olie Olson, Government's Exhibit No. 9, and in permitting the Government to read the entire statement to the jury.

X.

The Court erred in permitting the Government to introduce evidence of the Brix-Stumpf-Malter com-

bination, it being shown conclusively by the evidence introduced by the Government that that conspiracy had ended and terminated prior to the time of the claimed conspiracy or agreement between Coates-Malter-Stumpf.

XI.

The trial Court erred in denying to the defendant Coates the right to cross-examine the Government witness Malter, to show his bias, interest and motive for testifying against Coates. (Tr., p. 170.)

XII.

The trial Court erred in permitting the witness Malter to testify that at the Hotel Fresno the defendant Coates and one Morin were never capable of conversation and were intoxicated, and in refusing to strike that testimony, request having been duly made, on the ground that said testimony tended to degrade Coates and had no tendency to prove any act charged under any count of the indictment or any issue tendered in the case.

FACTS.

Coates was found guilty as charged in counts 1 and 4 and not guilty of the charges contained in counts 2 and 3 of the indictment and is the appellant. Defendant Kenney pleaded guilty to the four counts. Defendant Stumpf pleaded guilty to counts 1 and 4. Defendant Kirkorian pleaded guilty to the first and not guilty to the second, third and fourth counts. Defendants Olson, Brix, Proctor, Coates and Arkalian pleaded not guilty to all counts. Olson was found

guilty on the first count, Brix found not guilty. Arkalian was found guilty on counts 1, 2 and 4. Stumpf, who had pleaded guilty on counts 1 and 4, was given probation on count 1 and fined five hundred dollars on count 4. Kenney, who pleaded guilty to all counts, was likewise given probation.

The evidence upon which the conviction of Coates in the main rests was that given by Stumpf, who had theretofore been twice convicted of felonies against the Government and had pleaded guilty to counts 1 and 4 of this indictment. (Tr., p. 84.)

Besides being an accomplice, Stumpf, according to his own testimony, had engaged in two distinct conspiracies or combinations; the first, the Stumpf, Brix, Malter combination, and the second the Stumpf, Malter, Coates combination; that these combinations or conspiracies were distinct and separate and in each of them his object was to, in combination No. 1, defraud Brix of money, and in combination No. 2, defraud Coates of money. (Tr., pp. 88-89; Tr., pp. 90-91.) That the Brix combination had ended and Brix withdrew before the Coates combination was begun. (Tr., p. 93.) That these two combinations never got together. Stumpf's testimony is as follows:

> "The Coates-Malter-Stumpf and the Malter-Brix combinations never did get together. They were always kept separate. I never told either of them that I was building stills. The deal was that Coates and Malter were supposed to put in the money fifty-fifty, and out of the profits I was to get a third." (Tr., p. 90.)

Stumpf and Malter had bought tanks when they got Coates into the deal. Stumpf does not believe that he told Coates anything about the tanks. They were bought with five hundred dollars of Brix's money. Stumpf the Malter then represented to Coates that Malter was putting up five hundred dollars, and so Coates put up five hundred dollars. Stumpf kept Coates' five hundred dollars; gave Malter back his five hundred. The real money was put up by Coates.

> "I did not keep Coates advised as to all that I was doing, some things, but not all. I never told Coates that Olson and myself were going to build this still. Cap Olson and I never built this still. We never agreed to build the still. I didn't tell Coates that Olie Olson was building a still for me. I didn't tell Coates who was building a still for me.
>
> "We used some of Coates' money in building the still that Olie Olson was building for me and Brix and Malter. The deal between me and Brix and Malter was an entirely different deal from the deal between me and Coates and Malter but we did use some of Coates' money in the deal between Brix and Malter and myself. The deal dropped with Brix at that time. It dropped about 40 or 50 days when we first started. Brix had clear run out on me on this job before I called Coates in on this deal.
>
> "I don't know whether the statement in the indictment that Coates paid $500 in September is correct, or not. I don't remember the dates and if the $500 was put up by Coates September 19, 1930." (Tr., pp. 92-93.)

The first material was put up for constructing a still between Brix, Malter and Stumpf the latter part of August or September. Stumpf bought the tanks with Brix's money. He bought five tanks with Brix's money of 7200 gallons each.

> "You can use those tanks for anything, for water, or anything. They are the same identical tanks that you would see in any grape concentrate or in any grape juice business. * * * I discussed with Mr. Malter and Mr. Coates the capacity of these tanks." (Tr., pp. 93-94.)

Stumpf got money from Coates by telling him that he had put up a deposit to buy a still in Los Angeles, but not telling him how much it cost; that he was going down to get the still. That was shortly after Coates put up $500. Malter was present at the conversation. I told Hugo Malter the same thing. He knew it was a fake. He got more money out of Coates by telling him that he had to take a trip to San Diego. (Tr., p. 94.) Coates then bought a truck for hauling tanks, equipment and alcohol. (Tr., p. 95.) The truck was to be part of the Coates-Malter-Stumpf combination. (Tr., p. 96.)

> "I told Mr. Coates that I had bought a water system; that I would have to have it for a still. I never sent anything out there that looked like a still. There was nothing of any still sent to that place, nothing at all." (Tr., p. 96.)

The things presumably, according to Stumpf, to be used as parts of a still, were taken from the Caruthers

place to the Foss Ranch and Coates was so informed by Stumpf in December. Malter and Stumpf took Coates up there, showed him the still which Coates had never seen from September up to December. (Tr., p. 97.) It had been down on the Malter place but witness had not shown it to Coates as he was afraid Coates would talk. (Tr., p. 98.)

Coates, having given Stumpf considerable money, asked for an accounting. Stumpf endeavored to enlighten him in that behalf. (Re. Tr., pp. 98-99-100.) He testified, "I did not tell Coates that any of these expenditures went into a still. Then there is $1,250 for machinery." (Tr., p. 100.)

Malter and Stumpf took Coates out to see the still at the Foss Ranch but did not tell him that anybody else was interested in the still. At that time the still was not being operated. It had not been started. Coates was told that it would start in a few days, maybe tomorrow. Coates came up there with Olson and told Stumpf he was going to put a man in charge to run the place. Olson examined the mash and said that everything looked all right. (Tr., p. 103.) I took a sample of the alcohol that was run. I stood there and watched it. Jim Proctor and Slim Kenney and myself ran it. I don't remember whether Olie Olson was there, or not. I told Kenney and Proctor that Coates was one of the parties. Coates was not there when I told them. I did not tell Coates the sum but told him they worked so many days at so much a day. (Tr., pp. 103-104.)

"Q. What did Coates say about paying them?

"A. He would run the stuff first and then have

the money. We got a very little alcohol, a little bottle full, a mayonnaise bottle full. I brought it down to Coates. It was alcohol. Coates drank some of the pure alcohol."

The witness A. J. Olson, after testifying to his acquaintance with various of the defendants, said that he met Coates shortly before the case came up, having been introduced to him by Malter, and had not known him before.

"I never saw Mr. Coates after that until I went up to the still house and nobody was with him." (Tr., p. 108.)

"I know defendant Arkalian. I just met him the one time that he came to my house. Mr. Coates was with him. That was in February, 1931. They came together and I had a little conversation with them in the yard. Coates said, 'I thought I was the only one in this game.' I think that is what he said. Arkalian said that Stumpf was a rat, I believe." (Tr., p. 109.)

Cross-examination:

"Of course if you run a still you had to make your own mash before you made the alcohol. I ran my arm down into this stuff and the most you could make out of it in the light of your experience was a little syrup. Mash is only a name. This mash was all sugar and water." (Tr., pp. 109-110.)

E. Pusey Cain, called for the Government, testified that in October, 1930, he had gotten some tanks from

Malter. They were hauled up by a Japanese named Hatta; that he had had no conversation with Stumpf or Malter in regard to leasing his property for the use of a still. (Tr., p. 110.) And, on cross-examination, that at one time Malter brought Coates and Stumpf around; that they looked around the grape concentrate plant of the witness. He was introduced to Coates, showed him around the plant which he was actually constructing for grape concentrate; that these people had come over to buy a syrup plant which the witness was constructing the tanks for. There was a syrup plant there, the tanks used for receiving grapes and grape concentrate plant. He never heard any statement by Stumpf, Malter or Coates about Coates being interested in a still nor did any of them say anything about the manufacture of alcohol. He did hear them say something about being interested in the sale and distribution of grape syrup concentrate. (Tr., pp. 110-111-112.)

Wilbert G. Whitfield, Federal Prohibition Agent in Fresno, in 1930, testified that he was at the Foss Ranch; that he there saw tanks and vats. He took nothing from the vats, but took a sample, a half-gallon bottle of mash, from the gravity tanks that were at the still location in the barn. The sample he took back to the evidence room of his department, kept it until he gave it to Government Chemist Stribling. Of the sample, he said:

> "This ferments after you get it and hold it. It was tested shortly after I got it in my possession. * * * When I got this sample from the tank

on the Foss Ranch the ranch was deserted, with the exception of some forest rangers.

"There was nothing on the ranch. I have no idea who put this liquid into that tank container that I took it from." (Tr., pp. 112-113.)

The bottle of mash was then offered in evidence by the Government. The offer was objected to as too remote, not connected with the defendants and not showing who put the mash into the tank receptacle. The objection was overruled and the same received as Government's Exhibit No. 6. (Tr., p. 113.)

TESTIMONY OF WHITFIELD.

He (Whitfield) referred to a typewritten statement which he said was the result of an interview taken down in shorthand with Olson. The statement was offered in evidence. Objection of appellant Coates to its introduction was sustained in so far as Coates was concerned, the Court ruling that it was admissible against Olson, and the Government announced that it offered it only as to defendant Olson. (Tr., p. 141.)

The statement, which is in the form of question and answer, in so far as it relates to appellant Coates, is substantially as follows, and its introduction was protested as to Coates by the objection of the testimony which deprived Coates of an opportunity to cross-examine the witness. (Tr., p. 145.) The statement recited that Olson met Coates several times out at St. George Vineyard. He first saw him a long time after the witness started the still and that it was complete when Coates came out; that Stumpf and Malter had given

him the design; that Coates did not know anything about the still at all. He had a proposition, he wanted to build a still, too; a whiskey still. (Tr., p. 145.) He wanted to know what it would cost him. He never said anything more about it but that he wanted a still that would run out quite an amount. He didn't know anything about the still that I, Olson, was putting up. Malter, in the presence of Coates, said that Coates himself was going to put up the money for the still, but Coates didn't know anything about this one that I, Olson, was building. Stumpf was giving the directions as to this model and he was out there every day; took several months to complete the thing; it was carted up the hill in four sections; that he didn't see Coates while he was working on the still. (Tr., p. 149.)

Appellant Coates moved the Court to strike from the evidence all parts of the Olson statement referring to Coates, on the ground that such portions of the statement were irrelevant, incompetent and immaterial, not binding on Coates, made after the termination of any conspiracy which might have existed between Coates and others of the defendants, and on the ground that he, the said defendant Coates, had been deprived of an opportunity to cross-examine the said Olson as to such statements made by him. (Tr., pp. 151-152.) The Court denied the motion. (Tr., p. 153.)

Whitfield then said that of Government Exhibits 1, 2 and 3, the column and condenser he had first seen on a brush pile on the Malter ranch. On about the 22nd of April, after Hugo Malter had phoned him, he seized two 4000-gallon vats and eight 50-gallon vats and a

pump and a small boiler at the Foss Ranch. He made the discovery on April 5, 1931; that Hugo Malter pointed the place out where he discovered the articles. (Tr., p. 152.)

Fred D. Stribling, Government chemist, said that he had tested the contents of Exhibit 6, which had been given him by Agent Whitfield, and found it to contain mash containing 3.24 per cent alcohol by volume.

On cross-examination he said that he received the sample some time before the 17th of April, about a week; that Mr. Whitfield had told him that he had just received it. He made the test some time prior to the 17th of April; that such liquid changes from time to time, according to conditions, depending upon conditions and the amount of sugar, whether the alcoholic content were increased during a period of some months; that it was fairly warm in April; that that would have to do with the alcoholic content and he could not say what alcoholic content the specimen in question had in either January or February of 1931.

Whereupon defendant Coates moved the Court for an order striking from the record the testimony of the witness Stribling upon "the ground that the testimony was at variance with the allegations of the indictment, in that the charge against the defendant was conspiracy to possess and manufacture a still and not conspiracy to manufacture liquor, and that any evidence concerning the possession of liquor or manufacturing of liquor or alcohol was irrelevant and immaterial." The Court denied the motion and exception was noted. (Tr., pp. 113-114.)

E. L. Kenney, for the Government, testified that he had previously pleaded guilty in this case; that he knew Stumpf, Arkalian, and had seen Coates two or three times, that was all; that he knew who he was. He didn't know Brix; that he knew Olson. He had known Stumpf for four or five years and had been employed by him; that he knew Malter by sight; that about the 9th of December, 1930, Stumpf came out to see him and asked him if he would be interested in working at an alcohol still; that about a week later he met Stumpf in Fresno who said he was getting ready to start the proposition. The witness told him that he would go to work. The location of the still was not disclosed to the witness, who was to get ten dollars a day for work on the job and five dollars for every day he was in jail. (Tr., p. 122.) In about ten days he went up to the job to the Foss Ranch; when he got there, there was no equipment for a still. Jim Proctor was at the place. Stumpf returned and they started to work looking for water and a proper location, and decided to put the still in the barn. They repaired some barrels, filled them with water and put the mash into them. There was no still there at that time. Stumpf directed the mixing of the mash. Stumpf, Proctor and the witness prepared the mash. There was no sugar, so Stumpf gave the witness an automobile to haul up 47 sacks of sugar. (Tr., p. 123.) About a month after the witness went to work the distilling apparatus was hauled up to the Foss Ranch, "part by myself and part by Stumpf." Thereupon Government's Exhibits 1, 2 and 3, identified by the witness as parts of a still he had

seen on the Foss Ranch, were received in evidence. The defendant objected that no foundation had been laid; that there was no evidence to connect the defendants with the exhibits. Objection was overruled and exception noted.

He saw Coates at the Foss Ranch twice. He heard a conversation between him and Stumpf with reference to the payment of salaries of the witness and Proctor. This was along somewhere between the 9th and 10th of February. Stumpf wanted the witness to ask Coates for wages. The witness refused. Stumpf asked Coates about it and Coates said:

> "I refuse to pay anything off. * * * I put money into this deal and have never got any money back out of it. * * * in fact, Mr. Stumpf, I gave you $3,000. Mr. Malter gave you $3,000, and I refuse to put any more money in the deal. In regard to paying these men off, the only way I know that they will get their money is to go ahead and run the stuff off and sell the stuff." (Tr., p. 125.)

The witness heard a conversation in which Stumpf said:

> " 'I am going to get out from this deal. They don't seem to be satisfied with what I am doing here. This is your new boss coming up. I am through. If you fellows want to work any more, you can go ahead and work. If you don't you can quit.'
>
> "Stumpf said he would get some money. He went away and came back. He stalled. He was

evasive. He would say he would be back the next day or the second. He said he didn't get it at that time. On the last day that he was up he offered us $30.30. He said:

"'That is all the money I got.' We declined to take it. The still was built and we tore it down and rebuilt it. It was still up. When Coates and Olson came up the still had been tested and a run made on it, but we tried to run it and it wouldn't run. We made an effort to run it. We didn't get very much alcohol, about a gallon. That is the only time I knew of its ever having been steamed up while I was there. The matter with it was that the mash wasn't in shape to run, for one thing, and then it leaked, it leaked all over. * * * Once when Arkalian and Kirkorian were there, they were at the house and another time they were there Stumpf sent me up to the mountains and told me to keep out of sight, to lay low, that he didn't want them to see me." (Tr., pp. 126-127.)

On cross-examination he testified that Stumpf said:

"'Boys, this is your new boss. I am through.' I don't know whether he referred directly to Mr. Coates or Mr. Olson, but I believe it was Mr. Coates. Mr. Coates gave me no money at any time. I didn't demand any money from Coates."

The witness then tried to get his pay from Stumpf. Stumpf wanted him to ask Coates for the money. The witness told him that he didn't know whether Coates owed him any money. (Tr., p. 128.)

"Coates and Stumpf had an argument about pay-

ing off the men. Coates said, 'I am all through. You delusioned me on this deal up there. You told me that you paid $1,200 for this still and paid $200 to have it hauled up from Los Angeles. I have found out since that you made this still out at Malter's.' Stumpf told him (Coates) out there, 'If you don't pay these men they are going to bring suit against me and you know what that means.' (Tr., p. 129.)

"When I went back up there I told Proctor what I could find out, that Stumpf had got the money away from these fellows gypping them. I explained to him what Coates had said. At that time Stumpf admitted to Coates that Coates had given him $3,000 and Hugo Malter had given him $3,000, and he accused Stumpf of taking that money and furnishing the house and buying the place where he lives."

(It will appear from Malter's testimony, hereinafter referred to, at length, that Malter never paid any money into this venture; that he had delivered money to Stumpf and then received it back.)

The witness further testified that he had been convicted of a felony.

James Proctor, for the Government, testified that he knew Stumpf and Kenney, having met them in December; that he met Coates twice at the Foss Ranch; that Mr. Coates had been introduced under the name of Brown. Stumpf said he was going to put up a still and wanted the witness to work for him, and things were brought out and some materials were brought out. A

man named Olie Olson came to the Foss Ranch to work on the still. The still in question is the one in the courtroom. At the Foss Ranch he met Coates, Arkalian and Kirkorian. Coates came by himself. He had no conversation with him. Stumpf promised the witness eight dollars a day and board. Stumpf brought up groceries. Coates ate lunch at the ranch one afternoon and after he left, Stumpf wanted to dump out the mash and hide the still. (Tr., p. 132.)

On cross-examination the witness is asked:

> "Did you ever hear any talk on the Foss Ranch in the presence of Mr. Coates or Mr. Olson where anything was mentioned about the operation of the still or of the engaging in the manufacturing or sale of alcohol? A. No."

Walter G. Kerr, for the Government, testified that he knew Stumpf; had met Coates; knew Malter; didn't know Kirkorian. About September 9th Malter asked him if he would like to go to work. That afternoon he introduced him to Stumpf. He was to work for ten dollars a day and expenses as carpenter, repair work. Went to work on the 12th; that he went to work on the Malter place, where he saw Olie Olson working on some copper and what they claimed they were making a pot of. He saw Stumpf every day there. He never saw Coates down there. (Tr., pp. 135-136-137.)

On cross-examination he said that he had never heard anybody mention Coates' name; that he did lots of work for Malter and often heard him talk about being in the grape syrup business and that it was Stumpf who wanted

him to build a still, his business being that of a carpenter; that he quit because he got cold feet, also distrusted Stumpf, who never paid him but told him to go to hell when he asked him for his wages. (Tr., p. 137.)

G. H. Malter, a witness on behalf of the Government. The Court was informed that at the beginning of the trial an order had been made excluding all witnesses. Counsel informed the Court that the witness Malter had been furnished with the testimony as it was transcribed from day to day. Mr. McNabb, on the part of the Government, admitted that the witness had been furnished with a part of the transcript and had been interrogated on it, and that he had seen the witness reading the transcript, at least portions of it, which had been furnished to him by the Government; that the witness came in and wanted to see the transcript and we, the Government attorneys, let him look at it, and told him he could read it if he desired. (Tr., pp. 138-140.)

The Court ruled that the allowance of the testimony of the witness Malter was within the discretion of the Court; to which exception was taken. The testimony was admitted, whereupon the appellant Coates, through his counsel, then and there duly excepted to the ruling of the Court.

Thereupon the appellant Coates, through his counsel, upon motion, asked permission of the Court to examine the witness Malter as to the true facts surrounding the furnishing to him by the Government attorneys of the daily transcript. The motion was, by the Court, denied, to which the appellant Coates, through his counsel, then and there duly excepted.

Malter testified that he has lived in Fresno all his life and is acquainted with all the defendants in the case. He had never met Kirkorian, but he knew Brix about a year and a half in a social way prior to this transaction; that Brix called him up to go to his office and he there met Brix and Stumpf. This was early in August. Stumpf led the conversation, telling of his successful and unsuccessful experiences in the bootlegging racket, and there was some conversation as to the practicability of using syrup as a distilling material as a substitute for sugar. Something was said about whether syrup would be as well in making alcohol as sugar. Nothing definite was arrived it.

> "One evening Brix brought Mr. Denning to my house and the conversation was on the practicability of selling port wine and brandy."

He again went down to Brix's office, where he met Stumpf and Brix. Stumpf said they had two stills running and he was intending to start another one. He said the output of these other two stills was completely taken care of. He was trying to find a distributor for the third still. The conversation drifted around where Brix and the witness were to supply the money to get the still going and Denning was to take a quarter interest in the still for distribution. Stumpf was to be manager and furnish a truck.

> "There was another meeting between Brix, Stumpf and myself. A day or two later Brix and I went to Cap Olson's. I introduced Cap to Brix. There were a lot of apricots there and the sugges-

tion was made as to what good apricot brandy they would make. Brix said something about a man who could make a still and Cap Olson said something about his brother.

"We met again at Brix's house. Nothing definite came out of that meeting. Stumpf, Brix and myself had another meeting in August. At this one, Cap Olson was present. We made an appointment to go to Cap Olson's at 2 o'clock. Brix arrived and left $500. That was paid to me. Brix came in the house and only walked a few feet in. Stumpf, Olson and I sat and talked and I gave Olson $100 out of the $500 and gave Stumpf $400.

"The next time I saw Olie Olson he had a lot of copper and a few tools. I gave him an old building to put them in. About this time Olie Olson began to manufacture an alcohol still. He got the various pieces together. Stumpf, Brix, Olson and myself were there and Brix said the soldering was terrible. Brix showed Olson how to do the soldering. After awhile the stuff was moved over to Cap Olson's place. Tanks were moved over to Olson's barn, where they remained a few days and they were then hauled to Cain's place, about ten miles distant, where they remained possibly a month. Then they were taken over to another place that Stumpf had on the west side. This was the Caruthers place. Then they were moved back to Cain's.

"When Denning returned to get the alcohol, Stumpf said it would be impossible to deliver it until later. I didn't put up any money. I was supposed to put up some syrup when they got the tank set and ready to put the syrup in. When Stumpf got to the Caruthers place they wanted to

import a laborer. I recommended Kerr. Coates recommended Andreas. Stumpf and Coates and myself went down near the Caruthers place at one time. We rode by the place a couple of times. We drove by the place and went in the place once. Coates and I saw some tanks and equipment and some men working. They were Kerr and Cannon, setting up tanks and cleaning the barn out.

"I have seen Government Exhibit No. 5 in my house in October. Coates, Stumpf and myself were present at that time. Coates wrote down some of the items, the expenses that had been put out. Stumpf gave him the items; that is, the card that Coates was writing on at the time. It was laying on the table and I accidentally found it five months later."

To the introduction of this card, Exhibit No. 5, appellant Coates objected on the ground of no proper foundation being laid; that it had not been properly identified. Objection was overruled. Appellant Coates then and there excepted to the ruling of the Court. (Tr., p. 163.)

"I talked with Stumpf and Coates in connection with the San Diego trip in Coates' automobile. Coates drove us out to look at the ranch. A lot of material was taken to the Caruthers ranch and remained there three weeks or a month; then it was taken back to the Cain place and partly to my place. Coates told me that Andreas had reported to him that somebody looked in and saw the tank and this work was going on inside the barn, and then Coates and I decided it would be a better idea to get out of

the place, it might be dangerous. We then moved the stuff away from the Caruthers ranch, taking part of it back to Cain's place and the rest of it to my place. The equipment was next taken to the El Sonora place. From the El Sonora place the equipment was taken to the Foss Ranch. Some time in December. I didn't help move it. I gave the parts to Stumpf. Stumpf told me that there had been produced in that still at the Foss Ranch about a gallon of alcohol. He brought a sample down to Fresno. Coates, myself and Stumpf were present. I tasted it. It was pretty strong. Coates seemed to like it. Coates said he wanted Stumpf to get some, to have drinking liquor. He said, 'Well, can't you get five gallons of this?'

"I have been engaged in the grape syrup business."

On cross-examination Malter testified that he had read excerpts out of several volumes of testimony, but no complete volume; that it was not necessary to get permits in order to engage in the business of manufacturing grape concentrate. (Tr., p. 167.)

"The grape concentrate deal was mentioned by Coates to me. I am in the grape concentrate business now, experimenting in grape juice concentrate. When I got interested in this enterprise with Ted Brix and Stumpf, I was interested in grape concentrates. My idea was to sell the grape concentrate that I had on hand to men who were in illegal, illicit business, and if they wanted to use it to make alcohol, it was all right with me. I didn't tell Nichols on October 5, 1931, at any place, that

the deal started out as a legitimate juice deal and later became a still racket.

"In this enterprise I didn't put up any money. I was to put up some syrup. That was my contribution. Stumpf's contribution was his great executive ability, or something, or technical knowledge. * * * Tex Brix's contribution to the enterprise was money. When Brix got out of the picture and Coates came into it, Stumpf's contribution was to be executive ability and brains." (Tr., p. 169.)

"When I said Saturday that I was supposed to put up syrup, it was in reference to Brix. In all, I put up $1,800. I didn't put up a cent of that while Brix was in the picture. When I talk of money put in by me I do not mean money contributed. Where I say I contributed $1,800, I mean that I put up $1,800 in cash into the hands of Stumpf. I actually gave him $1,800 in cash. * * * Stumpf hijacked or stole the still from the Foss Ranch.

"When I paid moneys amounting to $1,800 to Stumpf, I knew he was a convict. I knew he was a bootlegger. I knew that Stumpf had lied to me. I knew that before I gave him this money. When this still was taken from the Foss Ranch by Stumpf it was placed in some bushes, but not on my property. I took Mr. Whitfield, the prohibition agent, to the place where they were hidden. I knew where they were hidden. The man who put them there told me they were there. His name is Cannon. He worked on my ranch. I said Stumpf was instrumental in having the still hijacked from the Foss Ranch. The still was put in the bushes on my

place and Mr. Whitfield picked it up half an hour after it was put there. * * * I made the arrangements with Mr. Whitfield. (Tr., p. 170.)

"I have known the defendant Coates for many years. Our relations were always purely social.

"In the arrangements in the beginning with Brix, Stumpf, myself and Denning, Coates *was not in on that; had nothing to do with it. Coates had nothing to do with the arrangements until after Brix had gotten out.*"

At page 170 this question was asked the witness:

"Do you remember at that time telling Mr. Savage in his office about the 10th of February that you had Coates where he could not say a word because you had it in Coates' own handwriting where it showed what it cost to make alcohol and that he was engaged in the still business and that you had that memorandum and you were going to keep it?"

To which question the Government interposed the objection that it was irrelevant, immaterial, incompetent and not proper cross-examination. The Court sustained the objection and exception was noted.

Witness continues:

"I had a conversation at one time with Coates and the witness Morin at the Fresno Hotel. Coates had a room there and I was living there, too, at that time. * * * There was no conversation of any serious character that could have been carried on. I left and came back later."

This question was asked of the witness:

> "Now tell, relate what took place after you came back, what you saw and what happened."

The question was objected to by defendant Coates on the ground that the same was irrelevant, incompetent and immaterial, which objection the Court overruled, and to which ruling the appellant Coates duly excepted.

> "A. They were never capable of conversation. They were intoxicated."

Whereupon the defendant Coates, through his counsel, asked that the answer of the witness be stricken out, and the motion was denied and the said defendant Coates again duly excepted to the ruling of the Court.

Witness continues:

> "When I came back, they were both lying on the bed."

Howard N. Foss testified on behalf of the Government that he sold to Mr. Stumpf 480 acres of land and identified the original agreement of sale. On cross-examination he testified that Stumpf told him when he entered into the agreement for the purchase that he was going to run a dude ranch with a fellow by the name of Malter. That he met Malter on the property.

> "I never saw Coates up in the hills on the Foss Ranch. I never heard Coates' name mentioned in connection with this deal. Other than Malter, nobody was mentioned." (Tr., pp. 172-173.)

On behalf of the defendants, E. A. Nichols was offered as a witness, who testified (Tr., p. 173):

> "* * * Malter told me that he had told the United States authorities that when he met Stumpf and Brix on the first occasion all the conversation was about concentrates.
>
> "Malter told me that the deal started out as legitimate juice deal and it became a still racket."

That he had Brix quit.

W. D. Coates, Jr., a witness called on behalf of defendant Coates, testified:

> "I have known Hugo Malter and had a conversation with him on the 26th of October at my house. I asked Malter what he was doing and he said that he and my son Lloyd were in the grape concentrate business and he absolutely assured me that he had, through the hard efforts of Henry Barbour, Congressman, acquired the proper legal permits to make grape concentrates, and I said to him, 'Is it perfectly all right if you make grape concentrate and what do you do with them afterwards?' And he answered, 'It is just the same as a man who ships a carload of wine grapes from here. It is none of his affairs what is done with it after they reach their destination. As long as I am legally making these grape concentrates, I am not interested in what becomes of it.' "

Edna Pearl Coates, a witness on behalf of the defendant Coates, testified:

> "I am the mother of Lloyd Coates. I heard Malter testify in court that he used an alibi on me. Used grape concentrate so as to put me off my guard. I never had a conversation with Malter in which grape concentrate was ever mentioned. I have never talked to Malter about grape concentrate."

On cross-examination she testified that during all of her conversations with her son he told her that Malter and he were in the grape concentrate business.

J. L. Broad (Tr., pp. 181-182) testified on behalf of defendants that he is a chief of police of Fresno; that he knows the general reputation of the witness Stumpf for honesty and integrity in this community and it is bad; that he would not believe him under oath.

On cross-examination he testified that Stumpf has been arrested a great number of times; he has been convicted of felony twice. Around Fresno it is a matter of common knowledge that he is a notorious criminal.

It was stipulated that the testimony of Doctor Ray would be as follows, he being ill and unable to testify:

That he saw Malter and Coates in October, 1930, and they said their money was tied up in a concentrate business and that as soon as they could get it out they would be interested in a stock deal.

W. G. Phillips (Tr., p. 183) testified on behalf of the defendant Coates that he met Hugo Malter and Coates at Coates' house about the 15th of October. Coates and Malter had a proposition for the manufacture of grape syrup and Coates wanted to know if the

witness would be interested in such a proposition to the extent of $3,000, the same portion being allotted to Coates and Malter.

Witness Francis Morin (Tr., p. 184) testified on behalf of Coates that he was in the oil business; that he met Malter and Coates on the 12th of December in the Hotel Fresno and that Malter told him that he and Coates were in the syrup business and desired to purchase tin cans, and Malter mentioned that in the syrup business it was necessary to have the cans lacquered on the inside.

ARGUMENT.

As has been pointed out, it is very plain that the evidence received for the Government indicated the existence of at least two distinct conspiracies; that this appellant Coates was not common to them but was a member of only one, to-wit, of the Stumpf-Malter-Coates conspiracy, if any ever existed.

The Brix-Malter-Stumpf conspiracy and all of the transactions which occurred between and among those three persons were foreign to the Coates conspiracy. Coates had nothing to do with Brix. Coates did not know what was going on between and among Brix, Stumpf and Malter. Coates was not told that Brix had ever put any money into a still, particularly in a still at the Foss Ranch, if there were one there.

Notwithstanding the complete line of cleavage and that the Government witnesses classify the Brix transactions as wholly distinct from the Coates transactions,

all of the evidence introduced concerning the combination of Brix-Malter-Stumpf and its purpose is received and was doubtless weighed by the jury against Coates. It seems to us that it adversely affected Coates to a material degree. It is true that the evidence of these distinct transactions went in practically without opposition, but this Court has the power, notwithstanding exceptions were not saved, to consider the error in this behalf and to relieve the appellant therefrom.

> "It is that in criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct in the interest of a just enforcement of the law serious errors in the trial of their cases fatal to the defendants' rights, although these errors were not challenged or reserved by objections, exceptions or assignments of error." *Lamento* v. *U. S.,* 4th Fed. 2nd, 901. Citing a great number of cases.

In the above case no exception to the charge was taken on points on which the reversal was granted.

The failure to except to a charge of the Court is akin to the failure to object and except to evidence. That appellant Coates was adversely affected by the testimony concerning the Brix combination seems by analogy to be the situation involved in *Terry* v. *United States,* 7 Fed. 2nd, p. 28. In that case it appeared that a number of persons, among them Terry, were charged by an indictment with having, near Allen's Wharf in Monterey County, about November 1, 1921, conspired to commit offenses against the United States in violation of the Na-

tional Prohibition Act. Terry was found guilty. On the trial the court admitted evidence over objection and exception tending to prove that, six weeks prior to the incident at Allen's Wharf, Terry employed one Frohn to transport liquor from Bodega Bay to a ranch near Petaluma and that about the same time the defendant Zucker rented a barn in that vicinity and that nine barrels of liquor were stored in it.

> "There was no testimony of any kind, direct or circumstantial, tending to connect any of the other defendants with this prior incident or transaction."

For the error in the admission of the Bodega Bay incident and the charge of the court pertinent to the same, the judgment was reversed and a new trial ordered. Since what occurred at Allen's Wharf has no relation to what occurred at Bodega Bay in point of common purpose of enterprise or of individuals involved, the Bodega Bay incident, involving as it did transportation of liquor, was held to have adversely affected the persons indicted for conspiracy at Monterey Bay.

The same reasoning would seem to apply here, assuming for argument's sake the truth of all the testimony of Stumpf and Malter. They were not only an unsavory pair, but were involved in unsavory business, and the jurors may very well have been induced to believe that Coates was guilty of a conspiracy to construct a still from the fact that two of Coates' associates had on other occasions, unknown to Coates, and for the purpose of accomplishing things that Coates could have had no in-

terest in, made efforts to construct a still or stills at different places and from money raised from different sources.

When we take from the sum total of evidence relied upon to connect Coates with either the crimes of conspiring to possess apparatus designed for the manufacture of liquor or with the possession of property and apparatus designed and intended by the defendants for the manufacture of liquor, all that evidence which concerns transactions foreign to himself, so little remains, if any, that we again urge that his conviction must have been induced by the evidence which we believe should have been excluded.

Stumpf and Malter had bought tanks before Coates came into any deal. Stumpf does not believe he told Coates anything about the tanks; they were bought with Brix's money.

The Brix deal had matured and Brix had withdrawn. The combination had ended before the Coates combination was begun. Malter and Stumpf avowedly had distinct objects when they dealt with Brix, Coates and Arkalian respectively. There was not one conspiracy; there were several. It seems to have been the view of the Court that even though there were distinct conspiracies, to one of which one group of defendant belonged and to another of which a distinct group belonged, that the evidence against one was admissible against the other, even though they were not working to a common but to distinct ends.

In the Terry case, supra, we find the following quotation from *United States* v. *McConnell,* 285 Fed. 164:

> "If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were cooperating without any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment."

It was highly prejudicial to Coates to be called upon to defend himself against transactions foreign to himself, to combat conversations between and among members of a distinct combination, and he had no means of foreseeing that they would ever be urged against him, and when these conversations related to matters in themselves breaches of law, the onus of which was made to fall upon Coates, although there had never been any dealings between him and the actors concerned therein.

Count I of the Indictment is Insufficient

Count 1 of the indictment charging a conspiracy under the provisions of Section 37 of the Penal Code of 1910, does not state facts sufficient to charge a public offense. The charging portion of the indictment is that the "said defendants did unlawfully and in violation of Sections 3 and 25, Title II of said Act, manufacture and possess apparatus intended and designed by said de-

fendants for the manufacture of intoxicating liquor, all of which should then and there be fit for beverage purposes and all of which should contain more than one-half of one per cent of alcohol by volume," etc.

Where the language of the statute is general in terms and does not specifically set out the elements constituting the offense, an indictment charging the offense in the generic terms of the statute is not sufficient.

Pettibone v. *U. S.,* 37 Law Ed. 419.

In *U. S.* v. *Robinson,* 266 Fed. 243, the court held:

> "Again, if the conspiracy attempted to be charged in these cases is framed under the old conspiracy act (Section 37 of the Penal Code [Comp. St., Sec. 10201]), while it is requisite in such case to plead and prove the doing of one or more overt acts by one or many of the co-conspirators after the formation of the conspiracy and in furtherance of its unlawful purpose to make out a completed and punishable offense, yet such overt acts charged to have been done cannot be resorted to, to explain or aid in any manner in making out the criminal charge of conspiracy. This is a settled law. In *United States* v. *Britton,* 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698, Mr. Justice Woods, delivering the opinion of the Court, says: 'The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiae, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute. It follows as a rule of criminal pleading that, in an indictment

for conspiracy under Section 5440, the conspiracy must be sufficiently charged and that it cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *Reg.* v. *King,* 7 Q. B. 782; *Commonwealth* v. *Shedd,* 7 Cush. 514.' In *Pettibone* v. *United States,* 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, Mr. Chief Justice Fuller, delivering the opinion for the Court, says: 'The conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy.' In *Dealy* v. *United States,* 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545, Mr. Justice Brewer, delivering the opinion of the Court, says: 'If the conspiracy was entered into within the limits of the United States and the jurisdiction of the Court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.' See, also, *Bannon & Mulkey* v. *United States,* 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; *Hyde* v. *Shine,* 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90; *Hyde* v. *United States,* 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614."

In *Brenner* v. *United States,* 287 Fed. 636, the Court held:

"An indictment must charge an offense directly, and not inferentially or by recital, and all material facts and circumstances embraced in the definition of the offense must be stated in the indictment, and, if any essential element is omitted, such omission cannot be supplied by intendment or implication.

"An indictment for conspiracy to commit an offense against the United States Government, to-wit, to use non-beverage alcohol for beverage purposes in violation of Food Control Act, August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 3115⅛e et seq.), Tax Act October 3, 1917, and Act November 21, 1918, which charged as the overt act the 'purchase of five barrels of distilled spirits, to-wit, non-beverage alcohol,' stated no offense nothing in these acts prohibiting such use of non-beverage alcohol, and there being no allegation of facts disclosing the contemplated use to be unlawful.

"An indictment must so distinctly state the facts claimed to constitute the criminal breach as to advise accused of the charge to be met, and afford him fair opportunity to prepare his defense, and so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, and so clearly that the court may determine whether the facts stated are sufficient to support conviction."

In *United States* v. *Dowling,* 278 Fed., at page 630, the Court held:

"Indictments under Criminal Code, Sec. 37 (Comp. St., Sec. 10201), charging conspiracy 'to commit an offense against the United States, that is to say, to violate Title 2 of the National Prohibition Act in this, to-wit, that the said (defendants) would then and there possess certain intoxicating liquors, to-wit (stating number of cases of liquor), contrary to the provisions of said act,' without stating the kind of liquor, or otherwise alleging which of the many provisions of the Prohibition Act defendants

conspired to violate, *held* insufficient as too general and not sufficiently informing defendants of the charge they were required to meet.

"In an indictment for conspiracy, allegations of overt acts cannot be resorted to in aid of an insufficient averment of the offense which was the object of the alleged conspiracy.

"An indictment for conspiracy to violate the National Prohibition Act by possessing 'certain intoxicating liquors (stating the number of cases), contrary to the provisions of said act,' without alleging any facts to show that such possession was unlawful, either on account of the time, place or purpose of the possession, or the character of the liquor *held* not to charge an offense."

In *Hilt* v. *United States,* 279 Fed. 421, the Court held:

"An indictment charging in one count that defendants conspired to violate Title 2 of the National Prohibition Act (41 Stat. 305) in that they 'would then and there possess certain intoxicating liquors (describing them), contrary to the provisions of said act', and in the second count that the same persons, at the same time and place, 'unlawfully and knowingly did possess certain intoxicating liquors' described, *held* insufficient to charge an offense in either count."

Though the transcript at bar does not disclose a demurrer or motion to quash for insufficiency of this indictment, it is, however, the law that failure to demur waives objections, except that some substantial element

of the crime was omitted from the indictment. In *Berry* v. *U. S.*, 259 Fed. 203, this rule is announced:

> "Failure to demur to the indictment waives all objections thereto, except the objection that some substantial element of the crime was omitted therefrom."

For aught that appears in the indictment under immediate criticism, that which the defendants conspired to possess might have been a stepladder or a piano, things clearly not designed for the manufacture of liquor. The pleader makes no effort to describe that which defendants possessed as designed to manufacture liquor, and hence there appears nothing but his conclusion that the things designed to manufacture liquor were adapted to that purpose. Under the cases above referred to, in order that an indictment state an offense, namely, conspiracy to manufacture and possess apparatus intended and designed by the defendants for the manufacture of intoxicating liquor, the indictment must show upon its face that the things which they conspired to possess could be used, that is to say, were designed and adapted for the accomplishment of the purpose. No resort may be had to overt acts pleaded to aid this deficiency and no reference may be made to the fourth count to aid the deficiency of the first count. The reading of the fourth count illustrates further the deficiency of the first count. In the fourth count, after charging these defendants with the possession of property and apparatus designed by them for the manufacture of liquor, the indictment goes further than the statement of the

conclusion and describes the apparatus so possessed, all of which are, or might, or could be component parts of a still.

Under the first count of this indictment, because of the substantial deficiences no defendant could ever know what property the Government had in mind and intended to charge him with possession of as adapted to the manufacture of alcohol, but the Government would be at liberty to indict and reindict these defendants as often as it saw fit, each time intending to rely upon some other and different set of facts, appellant's or defendant's jeopardy never having been measured by descriptive matter of an earlier indictment.

The rule requiring certainty, definiteness and precision in the indictment is just as applicable to an indictment charging conspiracy to commit an offense as it is to an indictment charging the actual commission of such offense.

U. S. v. *Cruikshank,* 92 U. S. 542, 23 L. ed. 588.

This was an indictment for conspiracy. It was held that all of the indictments were insufficient to state an offense, the court saying (p. 593):

> "Every ingredient of which the offense is composed must be accurately and clearly alleged. It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law, or by statute, includes generic terms, it is not sufficient that the indictment shall state the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars * * *

"The object of the indictment, is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail him of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

The substantial rights of the defendant Coates were invaded by the admission in evidence, through the testimony of a prohibition agent, of a confession or statement in the form of question and answer by codefendant Olson, made after the culmination of the conspiracy, if one ever existed. The evidence was hearsay; obviously defendant Coates had no opportunity to cross-examine Olson whose testimony in effect was in this manner laid before the jury. It is submitted that the error in its admission was not cured by the Court's instruction limiting the force of Olson's testimony to Olson himself.

In point is *People* v. *Gonzales,* 136 Cal., p. 666. Gonzales and Cota were jointly charged and tried for the murder of one Ruiz. The Court admitted in evidence, over the objection of Gonzales, declarations made by the defendant Cota to officers of the law after his arrest. These declarations had the force in incul-

pating Gonzales, Cota declaring that the responsibility in effect lay upon Gonzales. We quote:

> "Remembering that it is not Cota who gives this testimony at the trial, but other witnesses who are testifying to what Cota has said, it amounts to charging and attempting to convict Gonzales upon the merest hearsay evidence. It is true that the judge properly instructed the jury that the declarations of one defendant could not be considered by the jury as evidence against the other. * * * The Court reversed the conviction upon the ground that this testimony was hearsay and erroneously admitted even though no specific objection was made by Gonzales to the receipt of the testimony as hearsay."

The Court erred in receiving Government's Exhibit 6, which consisted of a glass container filled with a liquid said to have come from the gravity tanks at the Foss Ranch.

While Government Agent Whitfield was under examination, there was introduced through him a half-gallon bottle of mash from the gravity tanks from the still location in the barn at the Foss Ranch. This defendant might have been charged in the indictment either with the possession of intoxicating liquor in violation of Section 3 of the National Prohibition Act, or with the possession of liquor designed for the manufacture of alcohol in violation of Section 25, and, of course, might have been indicted for conspiracy to violate Sections 3 and/or 25 in that behalf; but he is not charged with the possession of intoxicating liquor for any purpose, but merely in count one, with a conspiracy to manufacture and possess apparatus designed for the

manufacture of liquors, and, in count four, with having had the possession of property and apparatus intended for the manufacture of intoxicating liquor.

If we assume that the mash in question did contain 3.24 per cent alcohol by volume, we submit that the substantial rights of this appellant were invaded by the receipt in evidence over his objection of intoxicating liquor under an indictment which as to either count failed to charge unlawful possession of intoxicating liquor. Furthermore, that which the witness Whitfield introduced in evidence was taken from the Foss Ranch after the abandonment of this enterprise, after persons other than these defendants or any of them were upon the scene, with no preliminary proof that the same had ever been in the possession of any of these defendants. It is most respectfully submitted that the objection of remoteness of the sample and the failure to connect the same with any of the defendants or to show that it had ever been under the control of any of the defendants or that this defendant knew it was ever there, is good.

The ruling of the Court on the testimony of the witness Stribling is associated with the ruling complained of on the admission of the bottle of mash. Stribling, as a Government chemist, had received the sample from Whitfield, had tested it, found it to contain 3.24 per cent alcohol by volume. The objection was made that Stribling's testimony was in variance with the allegations of the indictment in that the defendant was charged not with a conspiracy to possess or manufacture liquor, but with a conspiracy to possess and manufacture a still, and that evidence of the possession of liquor was therefore

irrelevant. The Court denied the motion of appellant Coates to strike out the evidence of this witness.

The error thus complained of is linked with that committed during the course of the examination of the witness Whitfield in this, that it there appeared from the testimony of the Government chemist that at any time that the substance in question may have been in the possession of any defendant, assuming that, for argument's sake, at some time it may have been, he could not say that at said time it had any alcoholic content, for he made his examination shortly before April 17. He doesn't know what it would contain as to alcohol three months prior thereto.

It is submitted that the Court erred to the great prejudice of the defendant Coates in permitting evidence offered through the witness Malter that when he had visited Coates and one Morin in a room in a hotel he had had no conversation with them, because they were both drunk and in bed.

It is obvious that the effect of this evidence was prejudicial in the minds of a jury, particularly as it was gratuitously degrading. Had Coates made any statements which might be said to be germane in this case while under the influence of liquor, the weight of such statements might be judged in the light of the circumstances under which they were made, but as no evidence in the case was brought out as a result of the visit of Malter to Coates, allowing the witness to testify that Coates upon that occasion was intoxicated, is, we repeat, gratuitous degradation.

It is submitted that the Court committed prejudicial error in refusing to the defendant Coates the right to develop, through the cross-examination of the witness Malter, the motives which impelled him to come forward and testify and at the same time to develop his bias, prejudice and interest in the case.

The witness was asked this question:

> "Do you remember at that time telling Mr. Savage in his office about the 10th of February that you had Coates where he could not say a word because you had it in Coates' own handwriting where it showed what it cost to make alcohol, and that he was engaged in the still business and that you had that memorandum and you were going to keep it?"

The Government's objection to this question as irrelevant and not proper cross-examination was sustained.

It is respectfully submitted that no citation of authority is necessary to establish that elemental proposition of law that any interest on the part of a witness adverse to a defendant on trial or the motives which may induce him to come forward and testify may always be developed upon cross-examination.

We have assigned as error the refusal of the trial court to exclude the testimony of the witness Malter on the ground that he had been permitted to read the daily transcript of the testimony after the Court had made its order at the beginning of the trial excluding all witnesses. The effect of such ruling permitted the circumvention of the Court's order excluding witnesses from

the room and enabled Malter, a witness whose interest and prejudice is obvious from his testimony, to keep abreast of the Government's case, to the end that no matters or facts which he, the witness, deemed material against Coates might be given in evidence against him. This is not a case in which a witness, inadvertently stepping into a courtroom, has apprized himself of the nature of the evidence then being given, but a situation wherein a hostile witness, with Government approval and aid, has deliberately been enabled to amplify his testimony, adverse to a defendant.

It is respectfully submitted that for the reasons hereinabove set forth the Court erred in denying the motion for directed verdict and in denying a motion for new trial, and that the judgment should be reversed and the cause remanded.

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